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PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner LaRoyce Lathair Smith respectfully requests that the Court grant a writ of *certiorari* to review the decision of the Texas Court of Criminal Appeals in his capital proceeding.

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals is reported as *Ex Parte LaRoyce Lathair Smith*, 185 S.W. 3d 455 (Tex. Crim. App. 2006). It is attached hereto as Appendix 1.

JURISDICTION

On March 1, 2006, the Texas Court of Criminal Appeals issued its opinion denying Mr. Smith's application for a writ of habeas corpus. *Ex Parte Smith*, 185 S.W. 3d 455 (Tex. Crim. App. 2006). No petition for rehearing was filed.

The Court has jurisdiction to review the decision of the Texas Court of Criminal Appeals pursuant to 28 U.S.C. § 1257(a) and Rule 13.1 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the application of the Eighth Amendment to the Constitution of the United States, which provides in relevant part, "nor [shall] cruel and unusual punishments [be] inflicted," and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part, "nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

I. COURSE OF PROCEEDINGS BELOW

Just over 18 months ago, this Court summarily reversed the Texas Court of Criminal Appeals ("CCA") on the merits of this case in *Smith v. Texas*, 543 U.S. 37 (2004). That decision reversed the CCA's rejection of Mr. Smith's habeas appeal in *Ex Parte Smith*, 132 S.W.2d 407 (Tex. Crim. App. 2004), attached as Appendix 2. This case is again before this Court after the CCA nonetheless denied relief on remand.

LaRoyce Lathair Smith was convicted of capital murder and sentenced to death in Dallas County, Texas, in June, 1991. The CCA affirmed his conviction and sentence in June, 1994. *Smith v. State*, No. 71,333 (Tex. Crim. App. June 22, 1994) (unpub. decision), *cert. denied*, 514 U.S. 1112 (1995). This decision denying Mr. Smith's direct appeal is attached as Appendix 3. Thereafter, Mr. Smith sought habeas corpus relief in the state courts. His first application for state habeas relief was dismissed as untimely in *Ex Parte Smith*, 977 S.W. 2d 610 (Tex. Crim. App. 1998) (replacing the earlier opinion of April, 1998, reported at 1998 Tex. Crim. App. LEXIS 55). The CCA subsequently authorized the filing of a second application for habeas relief, and Mr. Smith again filed for habeas relief in the instant case in March, 2000. On April 5, 2001, the state trial court recommended that the application be denied, and the CCA adopted that recommendation in *Ex Parte Smith*, 132 S.W. 3d 407 (Tex. Crim. App. 2004), attached as Appendix 2. This Court subsequently summarily reversed the decision of the CCA. *Smith*, 543 U.S. 37 (2004). On remand, the CCA again denied state habeas relief. *Ex Parte Smith*, 185 S.W.

3d 455 (Tex. Crim. App. 2006). *See* Appendix 1. It is that opinion, denying state habeas relief for a second time that is before this Court.

A. Guilt-Innocence Phase of Mr. Smith's Trial

The guilt phase evidence established that Mr. Smith and his accomplices entered a Taco Bell restaurant with the intention of stealing money and that the store manager, Jennifer Soto, was killed in the course of that crime. Mr. Smith was convicted of the capital murder of Jennifer Soto.

Some critical mitigating evidence concerning Mr. Smith's mental deficiencies and difficult family background was introduced during the guilt phase of Mr. Smith's trial. Johnnie Mae Smith, Mr. Smith's mother, testified that Mr. Smith was a slow learner in school and underwent a great deal of testing. SF 28:129, 130.[1] He failed first grade and was in special education programs throughout school. SF 28:130. By the age of 18, Mr. Smith had reached only the 9th grade. SF 29:34. The crime was committed when Mr. Smith was 19 years old. SF 29:21.

Johnnie Mae Smith also testified about Mr. Smith's father, Leroy Smith. Leroy Smith had been to the penitentiary for robbery. SF 28:126. He was involved in a motorcycle gang, caroused with other women, and abused alcohol and drugs, especially crack cocaine. SF 28:134-135. Leroy Smith stole from his family to support his drug habit, SF 28:135-137, and this situation greatly disturbed all of the members of the family, including LaRoyce Smith. SF

[1] References to the trial transcript, in Texas (in 1991) called the "statement of facts," are "SF" followed by the volume and page number.

28:138.

B. Penalty Phase of Mr. Smith's Trial

1. Testimony

The defense offered additional evidence of Smith's cognitive impairments and difficult background in the penalty phase of the trial. Alberta Pringle, records coordinator for the special education department for the Dallas Independent School District, testified that Mr. Smith had been identified at the earliest stages of his schooling as a slow learner with learning disabilities and speech handicaps. SF 32:17-42. Testing through the school district indicated that Mr. Smith's verbal I.Q. was 75 and full scale I.Q. was 78. SF. 32:33-34. A report prepared by Richard Adams, the director of health services for the Dallas Independent School District, SF 32:23, concluded on the basis of Mr. Smith's history and physical exam that Mr. Smith's learning problems were possibly organic in nature. SF 32:28.

Various family and community members confirmed the turbulent home life caused by Mr. Smith's father. Reverend Samuel Nicks, Mr. Smith's pastor, testified that he was aware that Mr. Smith's father had stolen from his family to support his drug habit. SF 32:10-11. He also testified that such behavior has an especially devastating impact on adolescent children. SF. 32:11. Dorothy Faye Ellis, a good friend of the family, testified that Mr. Smith's family situation affected him greatly, especially the economic hardship wrought by his father's thefts. SF. 32:92-93.

2. Sentencing Instructions

Mr. Smith's jury was required to answer the same special issues on deliberateness and future dangerousness as were at issue in *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*):

> 1. Was the conduct of the defendant that caused the death of the deceased committed deliberately, and with the reasonable expectation that the death of the deceased or another would result?
>
> 2. Is there a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society?

Affirmative answers to both questions required imposition of the death sentence.

The jurors were also provided with a nullification instruction that they could disregard the content of the special issues if they believed that mitigating evidence – including evidence with "no relationship to any of the Special Issues" – led them to conclude "that the death penalty should not be imposed." The full nullification charge is attached as Appendix 4.

Petitioner objected to the special issue scheme in three separate pretrial motions on the ground that the scheme did not afford adequate consideration of his mitigating evidence and that state law precluded supplementing the special issues with an unauthorized mitigation charge.[2]

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[2] Motion to Declare Tex. Code Crim. Proc. Ann. Art. 37.071 Unconstitutional, Index on Direct Appeal (Cause No. F91-22803-TR), 78, 80 (" The Defendant further maintains that TEX. CODE CRIM. PROC. ANN. Art. 37.071 is unconstitutional because it does not provide for the introduction and subsequent use by the jury of mitigating evidence which is not relevant or material to the special issues. There is no provision in Texas for the jury to decide the appropriateness of the death penalty taking into consideration the personal moral culpability of the Defendant balanced by mitigating evidence which is not directly or circumstantially probative in answering the special issues. There is no provision in the current statutory scheme for the jury to render its verdict that the death penalty should not be inflicted because of mitigating evidence of this type.") (this pretrial motion is attached as Appendix 5); Motion to Reveal Mitigation Charge, Index on Direct Appeal (Cause No. F91-22803-TR), 87 ("The Defendant in good faith herein advises the Court that he believes that during the punishment stage of this trial for the offense of capital murder he will be able to offer evidence in mitigation which has relevance beyond the parameters of the special issues contained in TEX. CODE CRIM. PROC. ANN. art. 37.071.") (this pretrial motion is attached as Appendix 6).

The trial court acknowledged petitioner's objections to the charge and denied both motions at the charging conference.[3]

During the closing arguments on the punishment phase, the prosecution emphasized the jurors' obligation to answer the special issues truthfully. Reminding the jurors of voir dire, the prosecution insisted on honesty:

> Now, when we talked to you on voir dire, we talked to you about – and we spent a lot of time talking to you to determine whether or not you could follow the law. You told us two very important things when we talked to you. First of all, you told us that in the appropriate case that you could give the death penalty. Secondly, you said, 'Mr. Nancarrow, Ms. McDaniel, if you prove to me that the answers to those special issues should be yes, then I can answer them yes.' If you wavered, if you hesitated

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Trial counsel also took the position that the defect in the Texas special issue scheme could not be cured by the submission of an ad hoc supplemental instruction not authorized by the Texas Legislature: "The exclusive methodology for submission to the jury of the special issues with regard to infliction of the death penalty are contained in TEX. CODE CRIM. PROC. ANN. Art. 37.071. This Honorable Court, as a trial court, can do no more than follow the law as it currently exists in the State of Texas. Therefore, the trial court is precluded in providing any instruction with regard to mitigating evidence .... For the trial court to create a scheme that would permit the jury to respond to the Defendant's mitigating evidence would contradict the current status of the law." Motion to Declare Tex. Code Crim. Proc. Ann. Art. 37.071 Unconstitutional as Applied, Index on Direct Appeal (Cause No. F91-22803-TR), 73, 75. This pretrial motion is attached as Appendix 7. In all of these motions, petitioner repeatedly cited the relevant precedent of *Penry v. Lynaugh*, 492 U.S. 302 (1989).

[3] The following exchange appears on the record:

> THE COURT: The two motions to declare Texas Code of Criminal Procedure Annotated, Article 37.071, Section 3701 unconstitutional as applied, I read those and sort of read them and put them in my mind together. Is there anything not included in those motions that your wish to supplement orally?
>
> MR. MANASCO: No, Your Honor.

SF VI: 3. This portion of the transcript appears as Appendix 8.

Immediately after this exchange, the trial judge asked counsel whether he wanted to word the mitigation charge differently:

> THE COURT: "If you see something in that charge that you'd like worded differently or you think could be made clearer or better, I'm always willing to entertain different wording or different ways of putting the idea."

SF VI: 3. This portion of the transcript also appears in Appendix 8.

In light of trial counsel's position that the legislature must authorize departures from the statutory special issue language, trial counsel declined to request alterations to the nullification instruction.

one minute on that, then I guarantee you, you weren't going to be on this jury. We believed you then, and we believe you now.

SF 33:20.

On voir dire, the prosecution repeatedly asked prospective jurors, including jurors who ultimately served, whether they could answer the special issues honestly and without attempting to achieve a particular sentence – life or death. For example, in the voir dire of Lynn Bartholomew, who served on Mr. Smith's jury, the prosecution wanted to ensure that she would not engage in any sort of nullification in answering the two special issues:

> Q. You take them independent. You can take them in either order. You can start with the second one first. They're just labeled one and two, but that doesn't mean you have to take them that way. You're supposed to take them independent of each other based on all the facts, let the facts determine what the answer is. By that, I mean don't answer them to get a desired result. Some people say, 'Well, if I find that he killed someone intentionally, I want him to die. So, I'm going to answer these yes to get that result regardless of the facts.' What we have to have are jurors that will tell us despite the fact that I found him guilty of capital murder and wanting a specific result, I will answer the questions based on the facts regardless of what the [sic] means, live or die. Do you think you can do that?
> A. Yes, I do.
> Q. Just let the facts and the circumstances dictate the way the answers to the questions should be answered regardless of the effect it has, either be a life or death sentence.
> A. I think I could.

SF 20:184-85.[4]

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[4]After this colloquy, defense counsel appeared to recognize the tension between the nullification instruction, which invited jurors to answer the special issues dishonestly in order to give effect to mitigating evidence, and the prosecution's anti-nullification comments, which told jurors not to answer the questions untruthfully to achieve a particular result. Accordingly, he sought to reassure Lynn Bartholomew that she could "change" one of her answers without truly "cheating or lying":

> Q. . . . Like the prosecutor was telling you, the court will indicate that if you believe through what's called mitigating evidence - that's really anything. It's stuff that you could hear in the guilt-innocence phase; it's stuff that you could hear in the punishment phase; it's the whole totality of circumstances - if you felt that

The jury verdict form did not include any mention of mitigating evidence, or of the ability of jurors to change their answers on the basis of such evidence, and asked only for answers to the two special issues:

SPECIAL VERDICT NO. 1

Do you find from the evidence beyond a reasonable doubt that the conduct of the Defendant, LaRoyce Lathair Smith, that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

In your verdict, your will answer "Yes" or "No."

ANSWER:_____ [signature lines].

SPECIAL VERDICT NO. 2

Do you find from the evidence beyond a reasonable doubt that there is a probability that the Defendant, LaRoyce Lathair Smith, would commit criminal acts of violence that would constitute a continuing threat to society?

In your verdict, your will answer "Yes" or "No."

ANSWER:_____ [signature lines].

The jury verdict form is attached as Appendix 9. The jury answered both issues affirmatively, and Mr. Smith was sentenced to death.

HOW THE ISSUES WERE DECIDED BELOW

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he shouldn't die, then you're authorized - actually the court says you shall, which is legal mumbo-jumbo for must, change one of the answers from 'yes' to 'no' if you feel that he should not die. Do you have any problem with that?

A. No.

Q. Okay. I mean, it's not like you're cheating or lying or doing something -

A. No.

SF 20:205

On direct appeal, Mr. Smith raised a claim under *Penry I*, arguing that the Texas special issues on deliberateness and future dangerousness did not provide an adequate vehicle for giving effect to his mitigating evidence of low intelligence and turbulent family background. The CCA rejected this claim in an unpublished opinion without discussion, relying on a previous decision that found a similar nullification instruction to be sufficient. *Smith v. State*, No. 71,333, at 11 (Tex. Crim. App. June 22, 1994) (citing *Fuller v. State*, 829 S.W.2d 191, 209 (Tex. Crim. App. 1992)), attached as Appendix 3.

In this state habeas proceedings, Mr. Smith again sought relief under *Penry I*, and the trial court recommended that the claim be denied. The trial court recommended that the claim not be entertained because it had been addressed on direct appeal; the trial court also concluded that Mr. Smith's mitigating evidence did not necessitate a supplemental instruction under the decisions of the CCA.

Before the CCA acted on the trial court's recommendation, this Court announced its opinion in *Penry v. Johnson*, 532 U.S. 782 (2001) (*Penry II*). In *Penry II*, this Court held, as in *Penry I*, that the special issues did not provide an adequate vehicle for the jury to give effect to the defendant's mitigating evidence. More particularly, this Court found in *Penry II* that the *Penry I* problem was not cured by additionally instructing jurors to answer the special issues dishonestly if they believed that mitigating evidence justified a sentence less than death. 532 U.S. at 796-804. In light of this Court's intervening decision in *Penry II*, the parties filed supplemental briefing on Mr. Smith's claim regarding the adequacy of the special issues and the supplemental nullification instruction to facilitate consideration of his mitigating evidence. The

matter was argued to the CCA on March 22, 2002, with the oral argument focused entirely on whether *Penry I* and *Penry II* required state habeas relief for Mr. Smith.

After oral argument in the CCA but before the CCA issued its ruling, this Court granted certiorari in two further cases involving the adequacy of the Texas special issues to facilitate consideration of mitigating evidence. *Smith v. Dretke*, 539 U.S. 986 (2003),[5] and *Tennard v. Dretke*, 540 U.S. 945 (2003). Although both of these cases potentially bore on the appropriate resolution of Mr. Smith's claims,[6] the CCA issued its opinion just before this Court issued its decision in *Tennard*. 542 U.S. 274 (2004).[7]

The CCA concluded that Mr. Smith's evidence of cognitive deficits and a turbulent childhood did not require a supplemental instruction under *Penry I*. The CCA maintained that Mr. Smith had failed to establish the presence of a "severe and permanent handicap," *Ex parte Smith*, 132 S.W. 3d at 415, and that he had "offered no evidence of any link or nexus between his troubled childhood or his limited mental abilities and this capital murder." *Id.* at 414. In this respect, the CCA fully embraced the test that was rejected by this Court's intervening decision in

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[5] Although the caption in the case is "*Smith v. Dretke*," the defendant's real name in that case is Robert McBride and is in no way connected to LaRoyce Lathair Smith.

[6] The question presented in *Smith v. Dretke* read:

> Did the Court of Appeals misapply *Penry v. Johnson*, 532 U.S. 782 (2001) by imposing a requirement that evidence demonstrate a 'uniquely severe permanent handicap' in order for a Texas capital murder defendant to claim that the use of a 'nullification' instruction was improper?

The first question presented in *Tennard v. Dretke* read:

> Is the Fifth Circuit's rule requiring a 'nexus' to the crime before evidence of impaired intellectual functioning and judgment can be considered as mitigation for purposes of determining whether there is a violation of *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*) inconsistent with the rationale of *Atkins v. Virginia*, 536 U.S. 304 (2002)?

[7] *Smith v. Dretke* was dismissed as moot pursuant to Rule 46.1 (agreement of the parties) after the sentence of

Tennard.[8]

In addition, the CCA asserted without discussion that the mitigating qualities of Mr. Smith's cognitive limitations could be adequately addressed via the deliberateness special issue. *Ex parte Smith*, 132 S.W. 3d at 414-15 ("[a]pplicant's mental limitations were surely relevant to whether he acted deliberately in committing this robbery-murder"). The CCA also maintained that Mr. Smith's troubled background and low intelligence might not necessarily require an affirmative finding to the dangerousness special issue on the theory that Mr. Smith might be able to learn from his mistakes. *Id.* at 415.

The CCA also attempted to distinguish the nullification instruction given in Mr. Smith's case from the instruction rejected as inadequate by this Court in *Penry II*. According to the CCA, the instruction in Smith's case unequivocally informed jurors of their power and duty to nullify. According to the CCA:

> These instructions expressly authorized and required the jury to answer 'No' to at least one of the special issues if it believed that the death penalty was not warranted because of the mitigating circumstances. The trial court's instructions clearly informed the jury that mitigation evidence 'trumped' the special issues.

Ex parte Smith, 132 S.W. 3d at 416 (footnote omitted).

In denying relief, a majority of the judges of the CCA refused to impose a procedural bar to Mr. Smith's individualization claim, though four of the nine judges asserted that the claim was procedurally barred. *Id.* at 423 (Hervey, J., joined by Keasler, J., concurring), and 428 (Holcomb, J., joined by Price, J., concurring).

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the petitioner (Robert McBride) had been commuted to life imprisonment. 541 U.S. 914 (2004).

[8] *Tennard*, 542 U.S. at 289 ("We hold that the Fifth Circuit's 'uniquely severe permanent handicap' and 'nexus' tests are incorrect, and we reject them.").

This Court summarily reversed the decision of the CCA. *Smith*, 543 U.S. 37 (2004). First, this Court rejected the state court's reliance on "precisely the same 'screening test' we held constitutionally inadequate in *Tennard*." *Id.* at 44.[9] This Court declared "[t]here is no question that a jury might well have considered petitioner's IQ scores and history of participation in special-education classes as a reason to impose a sentence more lenient than death." *Id.* This Court also disapproved of the CCA's application of the nexus requirement rejected in *Tennard*, finding that "the state court, however, erroneously relied on a test we never countenanced and now have unequivocally rejected. We therefore hold that the state court 'assessed [petitioner's legal] claim under an improper legal standard.'" *Id.* at 45 (citations omitted).

Second, this Court rejected the state court's claim that the nullification in Smith's case was less problematic than the one this Court rejected in *Penry II*. According to this Court, "[a]lthough there are some distinctions between the *Penry II* supplemental instruction and the instruction petitioner's jury received, those distinctions are constitutionally insignificant." *Id.* at 46. This Court emphasized that the clarity of nullification instruction to the jurors in petitioner's case – telling them explicitly of their power to change their honest answers to the special issues if they believed a life sentence was appropriate - did not avoid the "ethical problem" endemic to nullification instructions. In fact, this Court maintained that "the clearer instruction given to petitioner's jury . . . could possibly have intensified the dilemma faced by ethical jurors." *Id.* at 47-48.[10] Lastly, this Court noted that the mitigating evidence in Smith's case, as in Penry's,

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[9] This Court observed that "[f]our judges would have found petitioner's claim procedurally defaulted," and that "[t]he majority of the court, however, declined to adopt this holding and reached petitioner's claims on the merits." Smith, 543 U.S. at 43, n.3.

[10] This Court also observed that the prosecution's admonition to the jury to "follow the law" supported its

could not be given adequate effect via the special issues: "just as in *Penry II*, the burden of proof on the State was tied by law to findings of deliberateness and future dangerousness that had little, if anything, to do with the mitigation evidence petitioner presented." *Id.* at 48.

On remand, the CCA ordered the parties to submit supplemental briefing in light of this Court's summary reversal.[11] In its subsequent decision, a majority of the CCA held that the *Penry* error in his case was harmless. There are two components to the decision. First, the CCA concluded that petitioner had not properly preserved his individualization claim at trial – a decision that the court had refused to embrace, despite the urging of four concurring judges, in its opinion that was summarily reversed by this Court in *Smith v. Texas*. As a result, the CCA insisted that petitioner show "egregious" harm rather than "some" harm flowing from the Eighth Amendment violation. *Ex parte Smith*, 185 S.W.3d at 464.[12] Second, the CCA, proclaiming itself uncertain whether this Court necessarily decided that jurors were unable to give Smith's mitigating evidence adequate effect, examined whether, in the context of the trial, jurors were in fact precluded from giving effect to such evidence. The CCA concluded that Smith could not show "egregious" harm based on its view that Smith's mitigating evidence of cognitive impairment and abused background could have and were given significant effect via the special issues coupled with the nullification instruction. To reach this conclusion, the CCA emphasized

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conclusion that "the nullification instruction may have been more confusing for the jury to implement in practice than the state court assumed." *Smith*, 543 U.S. at 48, n.5.

[11] In its briefing, the state urged the CCA to impose the procedural bar that it had declined to impose in its decision that this Court summarily reversed, suggesting that "where the Texas Court of Criminal Appeals' decision is independently based on [a] state procedural ground, [the United States] Supreme Court lacks jurisdiction to review the matter." State's Brief on Remand at 3, attached as Appendix 10.

[12] In so doing, the Texas Court of Criminal Appeals did not hold that petitioner's constitutional claim was procedurally defaulted; rather, the court simply demanded a greater showing of actual harm as a predicate to relief.

that the nullification instruction was carefully explained to jurors on voir dire, *Ex parte Smith*, 185 S.W.3d. at 470, that the prosecution did not instruct jurors to ignore mitigating evidence during closing argument, *Id.* at 471, and that defense counsel made a moving plea that petitioner's life was "'worth saving.'" *Id.* at 472. In light of these considerations, the CCA declared that petitioner had failed to demonstrate that jurors were "unable to consider the totality of his extensive mitigating evidence, to appreciate his punishment theme, or to take account the specific evidence of his relatively low I.Q. test at the age of thirteen, his participation in a special education reading program and speech therapy, or his troubled family background." *Id.* at 471-72. Accordingly, the CCA found no "egregious harm" not because petitioner lacked extensive mitigating evidence (or because such evidence would not have persuaded jurors to impose a life sentence). Rather, the CCA rejected this Court's conclusion that jurors could not give adequate effect to his acknowledged "extensive" mitigating evidence. *Id.* at 471.

Judge Holcomb dissented from the state court decision. Although he was one of the four judges who would have applied a procedural default to petitioner's claim in the decision reversed by this Court, *see Ex parte Smith*, 132 S.W. 3d at 428 (Holcomb, J., concurring), in his current dissent Judge Holcomb insisted that "the majority reasoning that Smith did not preserve error cannot be countenanced, and further, it is not supported by the record." *Ex parte Smith*, 185 S.W.3d at 474. In Judge Holcomb's view, petitioner's trial objections to the special issues "were clearly sufficient to apprise the trial court of his federal constitutional claim" and "the majority is merely splitting hairs to avoid applying the proper beyond-a-reasonable-doubt standard to his meritorious federal claim." *Id.* at 475. Moreover, in light of the fact that the

CCA had "already addressed the merits of Smith's claim twice," *id.* at 478, Judge Holcomb insisted that the CCA could not impose a procedural hurdle on remand that it had twice declined to impose: "Because our holding was reversed by a higher court, a court which addressed the merits and found our holding on the merits to be erroneous, we may not now . . . decide that the substantive complaint was not preserved." *Id.* In addition, Judge Holcomb rejected the majority's conclusion that the error in petitioner's case was harmless based on the majority's view that jurors in fact could have given adequate effect to petitioner's mitigating evidence. This conclusion, Judge Holcomb observed, "weave[s] into its harm analysis the disavowed conclusion that the two special issues submitted sufficiently encompassed Smith's mitigating evidence." *Id.* at 479. According to Judge Holcomb, "our judicial power does not include the power to . . . ignore orders from the Supreme Court." *Id.*

REASONS FOR GRANTING CERTIORARI

I. THE DECISION OF THE TEXAS COURT OF CRIMINAL APPEALS THREATENS THIS COURT'S AUTHORITATIVE ROLE IN CONSTRUING AND APPLYING FEDERAL CONSTITUTIONAL LAW.

This Court has limited resources to give guidance in constitutional adjudication, especially as to the operation of constitutional principles within individual state death penalty schemes. Over the past five years, this Court has spoken directly to the constitutional adequacy of the former Texas "special issue" scheme to permit consideration of mitigating evidence. *See Penry II*, 532 U.S. 782 (2001); *Tennard*, 542 U.S. 274 (2004); *Smith*, 543 U.S. 37 (2004). In all three opinions, including the one in this case, *Smith*, this Court has rejected efforts to ratify death

sentences in cases where jurors were unable to give appropriate weight to significant mitigating circumstances. This Court has repeatedly insisted that the Eighth Amendment requirement of individualized sentencing is satisfied only if jurors are able "to give *full* consideration and *full* effect to mitigating circumstances in choosing the defendant's appropriate sentence." *Smith*, 543 U.S. at 46 (italics in original) (internal quotation marks and citations omitted). This Court has also made clear that the former special issues do not afford such consideration for evidence, such as petitioner's, of limited intelligence, special education placement, and a difficult and deprived childhood. *Id.* at 48 ("just as in *Penry II*, the burden of proof on the State was tied by law to findings of deliberateness and future dangerousness that had little, if anything, to do with the mitigation evidence petitioner presented"). Finally, this Court has made clear, in *Penry II*, but especially in its decision in this case, that inviting jurors to falsely answer the special issues via a nullification instruction does not cure the failure of the special issues to afford full consideration of a defendant's mitigating evidence. "There is no principled distinction, for Eighth Amendment purposes, between the instruction given to petitioner's jury and the instruction in *Penry II*. Petitioner's evidence was relevant mitigation evidence for the jury under *Tennard* and *Penry I*. We therefore hold that the nullification instruction was constitutionally inadequate under *Penry II*." *Id.*

The decision below, though it purports to deny relief on the ground that the error this Court identified is "harmless," in fact directly challenges the core conclusions of this Court's opinion. Moreover, the decision of the court below to impose a high standard of harm on remand, based on a procedural determination that it resolved differently prior to the remand, is a

transparent effort to avoid the consequences of this Court's ruling on the merits. The imposition on remand of a procedural obstacle previously rejected amounts to a "bait and switch" manipulation of this Court's appellate jurisdiction. Having addressed the merits without a procedural obstacle prior to this Court's intervention, the CCA cannot now choose to impose that obstacle. The decision below represents a threat to this Court's constitutional authority, and this Court should grant certiorari in order to defend its prior ruling in this case and its status more broadly as the final arbiter of federal constitutional law.

A. The Purported Harm Analysis in the Decision Below Is Nothing More than Disagreement with this Court's Conclusion on the Merits that Petitioner's Mitigating Evidence Could Not Be Given Adequate Effect via the Special Issues as Supplemented by the Nullification Instruction.

In its decision below, the CCA pointed to a number of considerations to support its conclusion that the constitutional error in this case was harmless. First, the CCA insisted that jurors in fact understood the nullification instruction given in this case and "[o]verwhelmingly" indicated on voir dire that they could alter their truthful answers to achieve a life sentence. *Ex parte Smith*, 185 S.W.3d at 468. Second, the CCA found significant the fact that the prosecution "never suggested that applicant's mitigation evidence should be ignored." *Id.* at 471. Lastly, the CCA seemed to suggest that because defense counsel made a powerful argument that petitioner's life was "'worth saving,'" *id.* at 472, jurors must have been able to give effect to his mitigating evidence. Based on these three considerations, the court was unpersuaded "that the jury was unable to consider the totality of his extensive mitigating evidence, to appreciate his punishment theme, or to take into account the specific evidence of his relatively low I.Q. test at the age of

thirteen, his participation in a special education reading program and speech therapy, or his troubled family background." *Id.* at 470.

It is striking that none of these considerations has anything to do with the weight or significance of petitioner's mitigating evidence. Indeed, the CCA explicitly recognizes that petitioner's mitigation – his low I.Q., involvement in special education, and abusive family background – was "extensive." Instead, each of the CCA's factors directly challenges this Court's conclusion on the merits that the special issues in combination with the nullification instruction provided an inadequate vehicle for juror consideration of petitioner's evidence.

The CCA's claim that the voir dire confirms jurors' ability to understand and act in accordance with the nullification instruction is precisely the argument this Court rejected in its summary reversal. In the opinion this Court reversed, the CCA emphasized that the nullification instruction by itself was sufficiently clear to inform jurors of their power to change their answers to the special issues if they believed that mitigating evidence. *Ex Parte Smith*, 132 S.W.3d at 416 ("The trial court's instructions clearly informed the jury that mitigation evidence 'trumped' the special issues."). This Court did not dispute the "clarity" of the nullification instruction or the ability of jurors to comprehend it. Instead, this Court insisted that a clear nullification instruction – well understood by jurors – might actually be worse because it "could possibly have intensified the dilemma faced by ethical jurors." *Smith*, 543 U.S. at 47-48. The problem is not simply that jurors were unable to understand the operation of the nullification instruction; rather, the nullification instruction required them to answer the special issues untruthfully in order to give effect to Smith's mitigating evidence. Accordingly, the *Penry* error identified by this Court

cannot be deemed less harmful because the voir dire confirms what this Court assumed: that the nullification instruction plainly told jurors to lie in order to give effect to mitigating evidence.

Moreover, this Court was well aware of the voir dire excerpts on which the opinion below rests when it declared the nullification instruction in this case constitutionally infirm. Those excerpts were quoted at length in Judge Hervey's concurring opinion. *See Ex Parte Smith*, 132 S.W.3d at 420-23. Judge Hervey, relying in part on these excerpts, ultimately voiced disagreement "with the United States Supreme Court that Texas jurors are incapable of remembering, understanding, and giving effect to the straightforward and manageable 'nullification' instruction such as the one in this case." *Id.* at 427 (using "*but see*" citation to *Penry II*). In the present opinion, Judge Hervey, concurring, joined by Judge Keasler, again voices this disagreement with *Penry II*, *Ex parte Smith*, 185 S.W.3d at 474 (stating that because the court is resting its judgment on harmless error grounds,[13] "we are not bound by the view, expressed in *Penry II* that Texas jurors are incapable of remembering, understanding and giving effect to the straightforward and manageable 'nullification' instruction such as the one in this case") (citing her prior concurring opinion in *Ex Parte Smith*, 132 S.W.3d at 427). Judge Hervey also expresses disagreement with this Court's opinion in *Smith*, stating "that the Constitution requires only that a jury be provided with a vehicle to meaningfully consider

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[13] Justice Hervey's concurring opinion wrongly characterizes the application of harmless error analysis as an "independent state ground." The application of harmless error analysis to a constitutional violation is not an independent state ground, and this Court has routinely treated state courts' applications of harmless error to federal constitutional questions as themselves subject to federal review. *See, e.g., Chapman v. California*, 386 U.S. 18, 21 (1966) ("Whether a conviction for crime should stand when a State has failed to accord federal constitutionally guaranteed rights is every bit as much of a federal question as what particular federal constitutional provisions mean, what they guarantee, and whether they have been denied."). Moreover, the majority opinion below nowhere endorses Justice Hervey's "independent state ground" characterization of its harmless error application.

mitigating evidence and not, as the Court's opinion seems to decide, a vehicle to 'fully and completely' consider mitigating evidence." *Ex parte Smith*, 185 S.W.3d at 473 (citation omitted).

Ultimately, then, the state court's argument that the nullification instruction given at Mr. Smith's trial was harmless is essentially an argument that this Court was wrong in holding "that the nullification instruction was constitutionally inadequate under *Penry II*." *Smith*, 543 U.S. at 48 (2004). In this respect, the state court decision conflates the contextual judgment involved in assessing whether a jury charge is constitutionally infirm with the contextual assessment appropriate to harmless error analysis. Under *Boyde v. California*, 494 U.S. 370, 381 (1990), courts must look at the context of the instruction "in the light of all that has taken place at the trial" to determine whether there is a "reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant mitigating evidence." *Id.* at 380. That sort of analysis is precisely what this Court undertook in *Smith*, looking at the special issues and nullification instruction in light of the circumstances of petitioner's trial. This Court found significant that the verdict form "made no mention whatsoever of mitigation evidence," *Smith*, 543 U.S. at 48, that the prosecutor "reminded the jury that each and every one of them had promised 'to follow the law' and return a 'Yes' answer to the special issues so long as the State met its burden of proof," *id.* at 48, n.5, and that the inquiries of the special issues "had little, if anything, to do with the mitigation evidence petitioner presented." *Id.* at 48. The state court's conclusion that the same voir dire excerpts before this Court when it found *Penry II* error now suggest that jurors could have given effect to

Smith's mitigating evidence is an attempt to repudiate this Court's decision on the merits.

Harmless error analysis, on the other hand, assumes that constitutional error has occurred and asks whether the mitigation evidence placed outside of jurors' consideration might have altered their decision to impose death. *See, e.g., Allen v. Lee*, 366 F.3d 319, 349 (4th Cir. 2004) (*en banc*) (Gregory, J., concurring) (harmless error focus after improper limitation on consideration of mitigating evidence is whether "the *totality* of the mitigation evidence" in light of the aggravating evidence might "have swayed at least one juror to spare [the defendant's] life").[14] Nowhere does the opinion below suggest that Smith's mitigating evidence was insufficient to influence the ultimate judgment of at least one juror, and such a conclusion could not possibly be sustained. Smith's evidence indicated that he had learning disabilities and speech handicaps at an early age (possible rooted in organic deficits), low intelligence, and an abusive family background. Mr. Smith's low intelligence, reflected in his 78 I.Q. score, by itself provided a basis for properly instructed jurors to conclude that he did not deserve to die. In conjunction with Mr. Smith's other mitigating evidence, such as his abusive family situation and the fact that he had only recently completed ninth grade at the time of the crime, Mr. Smith's

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[14] It is worth noting that this Court has never itself found an individualization claim harmless, though it has suggested that such claims are subject to harmless error review. *Hitchcock v. Dugger*, 481 U.S. 393, 399 (1987) ("Respondent has made no attempt to argue that this error was harmless"). Other courts have been extraordinarily reluctant to find limitations on the consideration of mitigating evidence harmless. *See, e.g., State v. McKoy*, 327 N.C. 31, 394 S.E.2d 426, 433 (N.C. 1990) (declaring that "it would be a rare case in which *McKoy* could be deemed harmless"); *see also State v. Fullwood*, 329 N.C. 233, 404 S.E.2d 842, 844 (1991) ("In light of the evidence adduced at trial, we cannot conclude . . . beyond a reasonable doubt that had . . . jurors been permitted, under proper instructions, to consider [the mitigating] circumstance, they nevertheless would have voted for the death penalty rather than life imprisonment.").

It remains an open question whether the type of individualization error this Court found here and in *Penry II* is likewise subject to harmless error analysis. The use of a nullification instruction affects the overall manner in which evidence is received or considered, in contrast to errors involving the erroneous inclusion or exclusion of particular pieces of evidence, as in *Arizona v. Fulminante*, 499 U.S. 279 (1991). Accordingly, this Court might well conclude that

mental deficits provided a compelling case for a sentence less than death. As a nineteen year old defendant with a 78 I.Q., Mr. Smith was clearly on the edge of categorical exclusion from the death penalty altogether based on his low intelligence and age. *See Atkins v. Virginia*, 536 U.S. 304 (2002); *Roper v. Simmons*, 543 U.S. 551 (2004). In combination, these mitigating factors together with his abusive family background and long-term placement in special education undoubtedly could have persuaded jurors to withhold the death penalty, and nothing in the purported "harmless error" analysis below suggests otherwise. Indeed, this Court has recently stated that evidence of an abusive background alone supports a reasonable probability of a life verdict in a capital case even in the context of a highly aggravated crime where jurors are likely persuaded of a defendant's future dangerousness. *Williams v. Taylor*, 529 U.S. 362, 398 (2000) (because "[m]itigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case," the state court decision rejecting prejudice as a result of counsel's ineffective assistance was objectively unreasonable).

Similarly, the argument that the constitutional error in this case was harmless because the prosecution "never suggested that the jury should ignore or fail to consider any of applicant's mitigation evidence," *Ex parte Smith*, 185 S.W.3d at 471, is an attack on this Court's merits analysis rather than a genuine harm analysis. The opinion below appears to suggest that jurors would in fact have been able to give effect to petitioner's evidence because they were not explicitly forbidden by the prosecution from doing so. First, this Court said the exact opposite –

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the use of nullification instructions in capital sentencing amounts to structural error requiring automatic reversal.

that the prosecution's remarks at closing argument encouraged jurors to confine themselves to the special issues and not to consider whether the defendant deserved to live or die; in particular, this Court's summary reversal found troublesome the prosecution's reminder to the jurors "that each and every one of them had promised to 'follow the law' and return a 'Yes' answer to the special issues so long as the State met its burden of proof." *Smith*, 543 U.S. at 48, n.5. From this Court's perspective, such a directive ran counter to the message of the nullification instruction, because it "intensified the dilemma faced by ethical jurors" who, believing that mitigating evidence justified a sentence less than death, also believed that the state had proved deliberateness and dangerousness. *Id.* at 48.

Second, the absence of additional prosecution comments to ignore mitigating evidence cannot render the constitutional error in this case harmless. This Court firmly and explicitly concluded that the special issues, coupled with the nullification instruction, did not allow jurors to afford "full consideration and full effect" to petitioner's mitigating evidence, and the fact that additional prosecutorial argument did not compound this error does not in any way suggest that petitioner's mitigating evidence was in fact adequately considered.

Finally, the CCA's argument that defense counsel powerfully argued for a sentence less than death is likewise an attack on this Court's conclusion that the special issues did not permit adequate consideration of petitioner's mitigating evidence. According to the opinion below, defense counsel spoke about petitioner's low I.Q. in his closing argument, spoke about his family problems, noted the "prodigious number" of defense witnesses, and indicated that petitioner's life was "worth saving." *Ex parte Smith*, 185 S.W.3d at 470. In light of this effective

punishment phase advocacy, the court was unpersuaded "that the jury was unable to consider the totality of his extensive mitigating evidence" and therefore that petitioner failed to establish the requisite harm. *Id.* at 471. But nowhere does the court below explain why strong advocacy regarding petitioner's mitigating evidence in any way lessened the error of the sentencing instructions which placed such evidence beyond the jurors' effective reach. As this Court concluded, the inquiries of the special issues "had little, if anything, to do with the mitigation petitioner presented." *Smith*, 543 U.S. at 48. The fact that defense counsel powerfully argued that petitioner's life was "worth saving" did not change the fact that the deliberateness and dangerousness questions did not allow jurors to express their view that petitioner's life should be saved. And the nullification instruction, which did invite consideration of mitigating evidence, did so in a manner that this Court explicitly rejected, because it required jurors to falsely answer the special issues to voice their endorsement of a life sentence. Again, instead of suggesting that petitioner's mitigating evidence was too flimsy to support a life sentence, the court below simply rejects this Court's conclusion that the sentencing instructions did not afford petitioner an adequate vehicle for considering his mitigating evidence. If fact, the lengthy description of petitioner's "extensive mitigating evidence," *Ex parte Smith*, 185 S.W.3d at 471, the "prodigious number of defense witnesses" who testified on his behalf, *id.* at 470, and defense counsel's "well-crafted closing argument" that petitioner's life was "worth saving," *id.*, at 472, all confirm that the error this Court identified cannot reasonably be dismissed as harmless.

B. *The Imposition of an 'Egregious Harm' Standard on Remand, Based on a Procedural Finding That the CCA Had Twice Refused to Adopt in this Case Prior to this Court's Summary Reversal, Constitutes an Impermissible Attempt to Evade the Consequences of this Court's Ruling on the Merits.*

The CCA twice addressed the merits of petitioner's *Penry* claim prior to this Court's summary reversal of its denial of relief. *See Smith v. State*, No. 71,333 (Tex. Crim. App. June 22, 1994), attached as Appendix 3; *Ex Parte Smith*, 132 S.W. 3d 407 (Tex. Crim. App. 2004), attached as Appendix 2. Accordingly, when this Court granted *certiorari* and addressed the merits of petitioner's claim, it did so without concerns about procedural obstacles. This Court expressly noted that although "[f]our judges would have found petitioner's claim procedurally defaulted," the "majority of the court, however, declined to adopt this holding and reached petitioner's claim on the merits." *Smith*, 543 U.S. at 43, n.3.

Now, after this Court rejected the CCA's conclusion on the merits, the CCA has chosen to penalize petitioner for the purported procedural default that it had previously declined to apply. Although the CCA does not hold petitioner's claim procedurally defaulted,[15] the CCA insists that petitioner must show "egregious harm" rather than "some harm" resulting from the constitutional violation. The imposition of a procedural hurdle on remand that the CCA previously rejected constitutes a manipulation of this Court's appellate jurisdiction. If state courts were free to reconsider procedural rulings after this Court's intervention, this Court would constantly be baited into announcing advisory opinions in contravention of the "case" or "controversy" requirements of Article III. Moreover, such a practice would afford state courts "two bites at the apple" to deny relief to federal claims, first on the merits and then, following

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[15] The majority does not impose a procedural default which would preclude altogether the entertaining of petitioner's claim, though the State's briefing on remand suggested this course of action to preclude further review by this Court. State's Brief on Remand at 3 ("where the Texas Court of Criminal Appeals' decision is independently based on [a] state procedural ground, [the United States] Supreme Court lacks jurisdiction to review the matter"), attached as Appendix 10.

reversal by this Court. on belatedly discovered or recognized procedural grounds.

This Court's precedents make clear that had the CCA purported to impose a full procedural default against petitioner's claim, such a default would not constitute an independent and adequate state ground of decision. *See, e.g., Barr v. City of Columbia*, 378 U.S. 146, 149 (1964) (holding that "state procedural requirements which are not strictly or regularly followed cannot deprive us of the right to review"); *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 300-302 (1964) (irregularly applied state procedural rules do not constitute adequate state grounds of decision). Where a state declines to impose a procedural default twice in the same case, and then seeks to impose it for the first time after this Court grants relief, it can hardly be said that the state procedural rule is "strictly or regularly followed." *Barr*, 378 U.S. at 149. In *Ford v. Georgia*, 498 U.S. 411 (1991), the Georgia Supreme Court sought to impose a procedural default against the defendant's *Batson* claim after this Court had vacated and remanded the state court's decision denying defendant's claim of purposeful discrimination in jury selection. This Court acknowledged that the state court rule for preserving *Batson* error was "sensible," *id.*, at 422, but concluded that in the circumstances of the case, in which the state court had already entertained the merits of defendant's claim under *Swain v. Alabama*, 380 U.S. 202 (1965), the application of the procedural default ran afoul on the requirement that only a "'regularly followed state practice' may be interposed by a State to prevent subsequent review by this Court of a federal constitutional claim." *Ford*, 498 U.S. at 424 (quoting *James v. Kentucky*, 466 U.S. 341, 348 (1984)).

The state's effort to burden petitioner's claim based on the same facts that would plainly not

qualify as an enforceable independent and adequate state ground of decision denies the full effect of this Court's constitutional adjudication. Just as this Court has condemned the prospect of defense lawyers "sandbagging" by withholding constitutional claims only to assert them in a later proceeding, *Wainwright v. Sykes*, 433 U.S. 72, 89 (1977), so too should this Court discourage state courts from withholding procedural objections to federal constitutional claims until after this Court has decisively rejected their adjudications on the merits. Not only do such untimely assertions of procedural default fail to satisfy the requirements for adequate state grounds, they are contrary to fundamental Due Process principles embedded in the doctrine of "law of the case." *See, e.g., Cohen v. Brown Univ.*, 101 F.3d 155, 167 (1st Cir. 1996) ("The law of the case doctrine precludes relitigation of the legal issues presented in successive stages of a single case once those issues have been decided."); *U.S. v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997) ("Under the 'law of the case' doctrine, 'a court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court, in the identical case.'") (quoting *Thomas v. Bible*, 983 F.2d 152, 154 (9th Cir. 1993)).

Moreover, the basis for imposing a procedural burden in this case is extremely thin. According to the majority decision, petitioner failed to make an adequate objection to the nullification instruction. On its view, petitioner's timely claim that the special issues failed to permit full consideration of his mitigating evidence and his explicit invocation of *Penry I* was not adequate to preserve his constitutional claim because he did not separately object to the nullification instruction added to the charge. *Ex parte Smith*, 185 S.W.3d at 461 n.8. This purportedly "procedural" analysis itself reflects the CCA's misunderstanding of the applicable

federal substantive law. Petitioner's timely and appropriate objection to the special issue scheme rested on his view that those issues did not afford adequate consideration of his mitigating evidence. The CCA's opinions throughout this litigation emphasize that the added nullification instruction cured such error. See *Smith v. State*, No. 71,333 at 11; *Ex parte Smith*, 132 S.W.2d at 410-411; 417; *Ex parte Smith*, 185 S.W. 3d at 468, 471. This Court found both that the special issues were inadequate to permit adequate consideration of petitioner's mitigating evidence (because the focus of those issues "had little, if anything to do with the mitigation evidence petitioner presented," *Smith*, 543 U.S. at 48), and that the nullification instruction did not cure that fundamental error ("the nullification instruction was constitutionally inadequate under *Penry II*," 543 U.S. at 48). In short, the CCA wants to deny relief to petitioner on his claim under *Penry I* because he did not specifically anticipate and challenge the State's (and subsequently the CCA's) flawed response to his *Penry I* claim. This Court has long rejected state procedural arguments that elevate form over substance, especially where the trial court has fair notice of the nature of the defendant's constitutional objections. *See, e.g., Osborne v. Ohio*, 495 U.S. 103, 124 (1990) (finding defense counsel's constitutional objections to the statute sufficient because the trial court plainly understood the nature of his objection in light of the "sequence of events"). In *Osborne*, this Court explicitly decried any requirement for defense counsel "to object a second time, specifically to the jury instructions" in a case where the basic underlying claim was clear, and noted that to insist on such a requirement "would force resort to an arid ritual of meaningless form . . . and would further no perceivable state interest." *Id.* at 124 (internal citations and quotation marks omitted).

Thus, the CCA violated the mandate of this Court's opinion by imposing an exceptionally high standard of harm on remand. Moreover, even if the CCA were authorized to impose its elevated standard, the constitutional error this Court identified undoubtedly caused petitioner "egregious harm" in foreclosing jurors' consideration of his low intelligence, abusive family life, and special education placement, especially in light of petitioner's age (19) and immaturity (9th grade) at the time of the offense.

CONCLUSION

For these reasons, this Court should grant certiorari to ensure compliance with its prior decision in this case and to preserve its role as the final arbiter of federal constitutional meaning. Because of the unusual posture of this case and this Court's recent extensive efforts to clarify the Eighth Amendment rights at stake in the Texas capital sentencing context, this Court should issue a summary decision reversing the decision of the CCA. In the alternative, this Court should grant certiorari and schedule this case for briefing and oral argument.

Respectfully submitted,

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